substantial failure of performance or a breach of an essential term, perhaps what Lord Diplock said in *Photo Production Ltd* v *Securicor Transport Ltd*[9] may throw some light on the matter. He had said that 'where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed.'

*Chitty on Contracts*, Vol 1, 24th Ed, states at paras 1270-71 that at common law, in the absence of a contrary intention, performance of the contract had to be carried out upon the exact date specified in the contract and a party could treat the contract as at an end if the other party's performance was not completed on a fixed date, since time was of the essence of the contract. However, in equity time was not of the essence of the contract except in three situations, namely, where the parties had expressly stipulated in their contract that the time fixed for performance must be exactly complied with, where the circumstances of the contract or the nature of the subject matter indicates that a fixed date must be exactly complied with and where time was not originally of the essence of the contract but one party had been guilty of undue delay and the other party had given notice requiring the contract to be performed within a reasonable time. It is clear therefore at both common law and equity that the plaintiff had the right to rescind the contract where time is of the essence in the contract.

At this stage of the proceedings, this court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

There was no evidence as to what stage of building progress the building was at at the completion date but from the photographs taken in July 1987, only the plaintiffs' house had been built out of a row of terrace houses and also no other houses could be seen in the area. Since, from the photographs, the plaintiffs' house appears to be the only house built in the area, it is possible that the construction could have even begun after the completion date. That, however, is of secondary importance.

What is relevant here is that the plaintiffs had entered into a sale and purchase agreement with the defendants to buy the house and had expected to move into the house two years later. They certainly would have made the necessary preparations for this event and any change in plans would have caused them a great deal of inconvenience and expense. Therefore, if the house was not completed on the appointed date and in fact had not been completed even five months thereafter when the notice to terminate was sent to the defendants and was only completed nine months later and the certificate of fitness issued 16 months after the appointed date, the court is of the view that it is within the right of the purchaser plaintiffs to rescind the contract with the defendants based on legal principles and case law.

Consequently, on these facts and having considered the pleadings, affidavits, arguments and authorities, I would answer in the positive as regards the preliminary issue raised. There will be no order as to costs. On their application and in view of the legal questions involved, I also gave leave to the defendants to appeal.

*Application allowed.*

Solicitors: *Lalchand, Nawawi, Phang & Co; SN Leow & Co.*

Reported by *Wong Kim Fatt*

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## Dollah bin Haji Salleh v Tuan Hj Muhyiddin bin Hj Mohd Yassin & Anor

HIGH COURT (JOHORE BAHRU) – ORIGINATING SUMMONS NO 31-706 OF 1988
ZAKARIA YATIM J
25 SEPTEMBER 1988

*Administrative Law – Order of declaration – Application for – Ban imposed by Johor Football Association ('JFA') on plaintiff from playing football at all levels in Malaysia – Whether ban was ultra vires JFA constitution – Whether plaintiff should have made further appeal to Football Association of Malaysia so as to exhaust all domestic remedies available to him*

*Civil Procedure – Estoppel – Ban imposed by Johor Football Association on plaintiff from playing football at all levels in Malaysia – Plaintiff commenced legal proceedings against JFA but these were later withdrawn – Whether plaintiff estopped from subsequently seeking declaratory order that ban was ultra vires – Whether plaintiff has exhausted all his remedies in JFA before commencement of proceedings*

The plaintiff was a football player for the Johor Football Association ('JFA') from 1982-87. Sometime in 1988 he resigned from JFA. By a letter dated 19 July 1988, the JFA banned the plaintiff from playing football at all levels in Malaysia for a period of three years. The letter told the plaintiff that the disciplinary committee of JFA had found him guilty of misconduct. The plaintiff appealed to the appeal committee of

the JFA which subsequently reduced the period of suspension to five months subject to the condition that he was only allowed to play for the national team and for his employers. At the same time, the plaintiff also commenced legal proceedings against the JFA in the High Court but these proceedings were later withdrawn.

In this originating summons, the plaintiff sought the order of the court for a declaration that JFA's ban was ultra vires the constitution of the JFA and/or the constitution of the Football Association of Malaysia ('FAM'). Alternatively, the plaintiff asked for a declaration that the decision of the defendants to ban the plaintiff from playing football can only be restricted in Johor.

At the commencement of the hearing, the defendants raised a preliminary point of law by contending that the plaintiff, by his actions, was estopped from inquiring into the validity of the ban imposed by JFA. The actions were: (a) discontinuing his earlier suit in the High Court; (b) apologizing to the defendants; (c) submitting himself to the jurisdiction of the disciplinary and appeal committees of JFA. The main issues raised in the originating summons were whether the suspension of the plaintiff was a valid decision and whether the plaintiff should have made further appeal to FAM so as to exhaust all domestic remedies available to him.

**Held:**

(1) The fact that the plaintiff has withdrawn the earlier civil suit does not prevent him from proceeding with the present action. The earlier suit was not adjudicated upon and the plaintiff is not estopped from proceeding with the present action.

(2) It is explicit in the letter that the apology was not for instituting the earlier proceeding but for allegations made by the plaintiff against the JFA. The letter of apology has no bearing on the defence argument on estoppel.

(3) As to the third preliminary point of law raised, the plaintiff is right in bringing the present action because he has exhausted all his remedies in the JFA.

(4) The suspension of the plaintiff was a valid suspension in so fact as it applied to the State of Johore only and JFA had no jurisdiction to extend the ban to other states.

(5) Although there is a provision in the FAM constitution allowing for further appeal to the FAM, the plaintiff has no direct contractual relationship or privity with FAM and he cannot be and is not a member of FAM.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 479 of 1988.]

**Cases referred to**

1 *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 (distd)
2 *Commissioner for Religious Affairs, Trengganu & Ors* v *Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222 (distd)
3 *Land* v *Land* [1949] 2 All ER 218 (refd)
4 *Tharmalingam* v *Sambanthan* [1961] MLJ 63 (refd)
5 *Datuk Pasamanickam & Anor* v *Agnes Joseph* [1980] 2 MLJ 92 (refd)
6 *Haji Osman bin Haji Aroff & Anor* v *Abdul Karim bin Pin* [1988] 1 MLJ 425 (folld)
7 *Datuk Murugasu* v *Wong Hung Nung* [1988] 1 MLJ 291 (refd)

*Ibrahim Hashim* for the defendants.
*V Chandran* and *Mohamad bin Ibrahim* for the plaintiff.

*Cur Adv Vult*

**Zakaria Yatim J:** In this originating summons, the plaintiff is seeking the order of the court for declaration that the decision of the Johor Football Association ('JFA') to ban the plaintiff from playing for any team other than the Pasukan Kebangsaan Malaysia and the Pasukan Kelab Talasco Insurance Sdn Bhd is ultra vires the constitution of the JFA and/or the constitution of the Football Association of Malaysia ('FAM'). Alternatively, the plaintiff asks for a declaration that the decision of the defendants to ban the plaintiff from playing football can only be restricted to Johor. The plaintiff also asks for further or other relief as the court deems fit and the costs of this application.

The plaintiff was a football player for JFA from 1982-87. Sometime in 1988 he resigned from JFA when he was offered fresh employment by Talasco Insurance Sdn Bhd. On 19 July 1988, the JFA banned the plaintiff from playing football at all levels in Malaysia. The plaintiff was informed of the ban in a letter addressed to him from the JFA dated the same day. The letter told the plaintiff that the disciplinary committee of JFA had found him guilty of misconduct. The letter stated that the plaintiff was suspended and banned from playing football at all levels for a period of three years with effect from 18 July 1988. The plaintiff was also suspended and banned from holding any office in any team or any football association for a period of three years effective from 18 July 1988. The letter also said that the plaintiff could appeal to the appeal committee of the JFA against the decision contained in the said letter within a period of 14 days from the date of the letter. The plaintiff appealed against the said decision on 28 July 1988. On the same date, he commenced legal proceedings against the JFA in the High Court, Johore Bahru vide Originating Summons No 31-643 of 1988. The legal proceedings were subsequently withdrawn on 8 August 1988. His appeal against the decision of the disciplinary committee of the JFA was heard by the appeal committee on 15 August 1988. The appeal committee decided on 16 August 1988 that the plaintiff's suspension be reduced to five months effective from 18 July 1988 to 31 December 1988 subject to the condition that he was only allowed to play for the national team, if selected, and for his employers, Talasco Insurance Sdn Bhd. The decision of the appeal committee was conveyed to the plaintiff in a letter dated the same day. The said letter is reproduced below:

Encik Dollah bin Haji Salleh
Talasco Insurance Sdn Bhd
Bangunan Talasco
385, Jalan Tuanku Abdul Rahman
50100 Kuala Lumpur

Tuan,
Per: Rayuan Terhadap Penggantungan Daripada Bermain Dan Pengurusan Bolasepak.

Adalah saya diarah memaklumkan bahawa Jawatankuasa Rayuan Persatuan ini telah bersidang pada 15hb Ogos, 1988 untuk menimbangkan rayuan tuan dan keputusannya adalah saperti berikut:

(i) Bahawa hukuman penggantungan tuan daripada bermain bolasepak selama 3 tahun mulai daripada 18/7/1988 dikurangkan kepada tempuh 18/7/1988 – 31/12/1988.
(ii) Bahawa hukuman penggantungan tuan daripada memegang sebarang jawatan di dalam mana-mana pasukan, atau persatuan bolasepak selama 3 tahun mulai daripada 18/7/1988 dikurangkan kepada tempuh 18/7/1988 – 31/12/1988.
(iii) Bahawa tuan hanya dibenarkan bermain bolasepak untuk pasukan-pasukan yang disebutkan di bawah ini sahaja:
  a) Pasukan Kebangsaan Malaysia jika tuan dipilih.
  b) Pasukan Kelab Talasco Insurance Sdn Bhd – Majikan tuan.

Sekian terima kasih.

Yang benar,
(Mustafa bin Mohd Said)
Setiausaha Ykh.
16hb Ogos 1988

At the commencement of the hearing of this originating summons, Encik Hassan Ibrahim, counsel for the defendants, raised a preliminary point of law for the decision of the court. He submitted that the plaintiff, by his actions, was estopped from inquiring into the validity or ground of the sentence passed by the JFA. According to him the plaintiff's actions were: (1) discontinuing his earlier suit (31-643 of 1988); (2) apologizing to the defendants; and (3) submitting himself to the jurisdiction of the disciplinary committee of the JFA and the appeal committee of the JFA. The apology letter referred to by Encik Hassan was exhibited to the affidavit of the first defendant affirmed on 27 August 1988. The said letter is reproduced below:

5hb Ogos 1988

YAB Tuan Haji Muhyiddin bin Mohamed Yassin
Menteri Besar Johor
Merangkap Presiden
Persatuan Bolasepak Negeri Johor
No 4, Jalan Sutera 9
Taman Sentosa
80150 Johor Bharu

Yang Amat Berhormat,

Per: Kenyataan Akhbar Dollah Salleh

Adalah saya dengan hormatnya dengan hati yang iklas memohon maaf kepada YAB Menteri Besar Johor sebagai sifat Presiden Persatuan Bolasepak Negeri Johor, serta pegawai-pegawai YAB diatas tuduhan-tuduhan yang saya lemparkan terhadap mereka.

Dengan itu juga saya dengan sukacita menarik balik saman yang telah difailkan di Mahkamah Tinggi Johor Bahru melalui peguam saya.

Sekali lagi saya dengan rendah hati memohon berbanyak-banyak maaf diatas segala kesusahan yang menyinggong perasaan YAB terhadap perkara saya ini. Dengan hati yang iklas saya berharap YAB dapat memaafkan saya jua adanya.

Terima kasih.

Yang benar,
Sgd
(Dollah bin Haji Salleh)

In support of his argument on estoppel, Encik Hassan relied on a passage in the Privy Council case of *Kok Hoong* v *Leong Cheong Kweng Mines Ltd.*[1] But the facts of that case are entirely different from this case. In that case the appellant obtained judgment in default against the respondent on 3 November 1954 for arrears of rental payments from 20 September 1953. Subsequently the appellant commenced another action on 14 June 1959 for moneys alleged to be due to him and other reliefs. The respondent contended that the appellant was estopped from proceeding in the subsequent action in view of the judgment in default obtained on 3 November 1954. The Privy Council decided that it was impossible to say that there was anything in the first judgment which decided the issue raised in the second action and therefore the estoppel claimed could not be maintained.

Encik Hassan next referred to a Federal Court decision in *Commissioners for Religious Affairs, Trengganu & Ors* v *Tengku Mariam bte Tengku Sri Wa Raja & Anor.*[2] In that case the parties agreed to refer a document of 'wakf' to and abide by the decision of the Mufti or the Majlis Alim Ulama. The Mufti gave his 'fetua' that the 'wakf' was valid. Wan Suleiman J, as he then was, subsequently declared that the wakf was invalid. The Federal Court decided that although the wakf was invalid the parties were estopped from questioning its validity as they had agreed to abide by the decision of the Mufti.

It is clear that *Kok Hoong's* case[1] does not apply here. In that case there was an earlier judgment in default and the Privy Council held that the appellant was not estopped from proceeding with the subsequent action. In the present case the earlier civil suit was withdrawn and no judgment was obtained. Similarly the facts in the *Tengku Mariam's* case[2] are different from the present case and that case is not applicable here.

In my judgment the fact that the plaintiff has withdrawn the earlier civil suit does not prevent him from proceeding with the present action. When the case was discontinued the court did not impose any condition except to order costs to be paid to the defendants. See O 21 r 4 of the Rules of the High Court 1980. See also *Mallal's Supreme Court Practice*, 2nd Ed, Vol 1, p 263. A learned writer has stated that the mere withdrawal of a

summons will not in itself operate against the party withdrawing it so as to estop him from making the same or similar averment in future proceedings: *The Doctrine of Res Judicata* by Turner, pp 34 and 35. In the present case the earlier suit was not adjudicated and the plaintiff is not estopped from proceeding with the present action: see *Land* v *Land*.[3]

Encik Hassan further submitted that the letter of apology quoted above operates as an estoppel against the plaintiff from proceeding with the present action. It is explicit in the letter that the apology was not for instituting the earlier proceeding but for allegations made by the plaintiff against the JFA. This is in fact conceded by counsel for the defendants. The letter of apology has no bearing on the defence argument on estoppel.

Encik Hassan also argued that by submitting himself to the disciplinary proceedings of the JFA the plaintiff is not entitled to the present action. In my view the plaintiff was right in bringing the present action because he has exhausted all his remedies in the JFA. See *Tharmalingam* v *Sambanthan*.[4] See also the judgment of Raja Azlan Shah CJ (Malaya), as he then was, in *Datuk Pasamanickam & Anor* v *Agnes Joseph*.[5]

I accordingly overruled the preliminary points of law raised by the defendants and proceeded to hear the case on the merits.

The issue raised in the originating summons is whether the decision of the appeal committee as stated in the letter quoted above is a valid decision.

It is not disputed that under art 51 of the constitution of the JFA, the association has the power to remove any member or to suspend that member from taking part in the activities of the JFA.

In my opinion the suspension of the plaintiff as stated in the letter dated 16 August 1988 was a valid suspension in so far as it applied to the State of Johore only.

The plaintiff, in his affidavit in support of the originating summons, complained that the said decision precluded him from playing for any state team especially for the Football Association of Selangor of which Kelab Talasco Insurance Sdn Bhd is a member.

This is confirmed by the second defendant who is secretary to PBNJ in his affidavit affirmed on 27 August 1988. In para 7 of the said affidavit the second defendant stated that the ban imposed on the plaintiff by JFA was not only effective within Johore but also outside the state.

In my opinion the ban imposed on the plaintiff is effective only in the State of Johore. In *Haji Osman bin Haji Aroff & Anor* v *Abdul Karim bin Pin*,[6] the Supreme Court in its judgment at p 427 said:

> We are further of the opinion that the three-year ban against the respondent which took effect from 3 December 1985 should be effective within Kedah only. This is because the jurisdiction of KFA is limited to within the state. Article 7(c) of the constitution of the Football Association of Malaysia ('FAM') in which the KFA is a member states, inter alia:
>
> '...Each state association shall cover a defined area and shall neither extend nor alter such area without having obtained the consent of the Council.'

The KFA has a similar provision under art 9(c) of its constitution relating to its affiliated associations.

Since the ban imposed on the plaintiff is effective only in the State of Johore, JFA has no jurisdiction to extend the ban to other states.

Learned counsel for the defence submitted that after the decision of the JFA, the plaintiff should have made further appeal to the Football Association of Malaysia ('FAM') as provided under art 53 of its constitution. According to the defence the plaintiff has not exhausted all remedies available to him domestically. With respect, although there is such a provision in the FAM constitution, the plaintiff has no direct contractual relationship or privity with FAM and he cannot be and is not a member of FAM: see *Datuk Murugasu* v *Wong Hung Nung*.[7] What is required in the instant case is for the plaintiff to exhaust his remedies in JFA and this he has done.

For the reasons stated above the decision of the JFA to ban the plaintiff from playing for any team other than the Pasukan Kebangsaan Malaysia and the Pasukan Kelab Talasco Insurance Bhd is not ultra vires the constitution provided that the ban is not made effective outside the State of Johor. Costs in the cause.

*Order accordingly.*

Solicitors: *Hassan Ibrahim & Co*; *Mohd Ibrahim & Co.*

Reported by *Ng Sheau Jiuan*